In the Supreme Court

of the

United States

OCTOBER TERM, 1964

No. [redacted] 4

MARC D. LEH, individually and THE PROGRESS COMPANY, a copartnership comprised of MARC D. LEH and DAVID BROWN, copartners,

Petitioners,

vs.

GENERAL PETROLEUM CORPORATION, a corporation, et al,.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

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Marc D. Leh, individually and The Progress Company, a copartnership comprised of Marc D. Leh and David Brown, copartners,

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General Petroleum Corporation, a corporation et al.,

Respondents.

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STATEMENT OF THE CASE

In 1956 petitioners brought suit under section 4 of the Clayton Act for treble damages allegedly suffered as the result of a conspiracy among respondents (R. 2). Pretrial proceedings established that petitioners' complaint was based upon the alleged loss of a supply of gasoline

from respondent General Petroleum Corporation in 1954 (R. Tr. 412-413). Petitioners concede that the alleged cause of action accrued "no later than February, 1954" (Pet., p. 3). Respondents filed a motion for summary judgment on the grounds (1) that the undisputed facts developed by discovery established that petitioners had suffered no damage as the result of any acts of respondents, and (2) that the alleged cause of action was barred by the statute of limitations (R. 612). The District Court, without ruling on the first ground, sustained the motion on the second ground (App. to Pet., p. 33). The decision was affirmed by the Court of Appeals (App. to Pet., p. 1).

QUESTIONS PRESENTED

1. Was this action governed by section 340(1) of the California Code of Civil Procedure which prescribes the statutory period for "An action upon a statute for a penalty * * * when the action is given to an individual" (as was held by the courts below), or by section 338(1) of the same code covering "An action upon a liability created by statute, other than a penalty * * *" (as is contended by petitioners)?

2. Was the statute of limitations in this case tolled by the pendency of *United States v. Standard Oil, et al.*, a civil antitrust suit brought by the Government in Los Angeles in 1950 and disposed of by consent decree as to six defendants in 1959, and by dismissal as to the remaining defendant in 1961?

ARGUMENT

None of the grounds upon which this Court grants certiorari is, we submit, present in this case. There is no conflict of decisions. The question concerning the statute of limitations is an isolated question of state law which

cannot recur under a Federal statute which has been in existence for more than eight years. The decision of the Court of Appeals on this point, affirming the decision of the California District Court on a question of California law, is clearly correct. The decision of both courts on the question whether the statute was tolled by the pendency of the Government case is also clearly correct. The alleged conspiracies are not the same, the alleged conspirators are not the same, the alleged objectives are not the same, and the alleged acts are not the same (R. 2, 12, 1136). Indeed, petitioner does not argue to the contrary but simply attacks an earlier decision of the Court of Appeals (*Steiner v. 20th Century-Fox Film Corporation* (9 Cir. 1956) 232 F.2d 190) which has no application to the present case (Pet., pp. 17-28).

Prior to the Act of July 7, 1955, establishing a uniform period of limitation for actions brought under the antitrust laws (15 U.S.C. 15b), the applicable period of limitations was determined by local law (*Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390, 397). As there were 48 states, each with a variety of time periods for different kinds of suits variously described, with time and description varying from state to state, there was both uncertainty and lack of uniformity. It was to remedy this unsatisfactory situation that the Federal act was passed more than eight years ago.[1] Since, as all concede, that Act is not applicable to this action, the issue here was simply one of determining which of two sections of the California Code of Civil Procedure was the applicable one, section 340(1) or section 338(1).

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1. See Report of the Attorney General's National Committee to Study the Antitrust Laws, 1955, pages 380-383.

1. Under points I and II (Pet., pp. 4-11), petitioners argue that under Federal law an action to recover damages under the Sherman Act is not an action to recover a penalty (citing *Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390), and that the courts below erred in applying state law "to determine the 'nature' of the private antitrust cause of action as penal or nonpenal" (Pet., p. 7).

Both courts below and respondents agree that the nature of a cause of action created by Federal law is a Federal question. But starting with the nature of the action as ascertained from Federal law, the question of which state statute of limitations applies to that kind of action is a matter of interpreting the language of the state statutes, which is a state question. When the problem was a live one, as it has long ceased to be, the courts reached a consensus to this effect. See, for example, *Gordon v. Loew's Incorporated* (3 Cir. 1957) 247 F.2d 451; *Powell v. St. Louis Dairy Company* (8 Cir. 1960) 276 F.2d 464; *North Carolina Theatres, Inc. v. Thompson* (4 Cir. 1960) 277 F.2d 673. And until their present petition, petitioners fully agreed with this consensus. The opinion of the Court of Appeals quotes the following from petitioners' Reply Brief before that court (App. to Pet., p. 19):

> "Everyone concedes that the problem is how a California court would characterize this action under the language of the two specific California statutes."[2]

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2. Petitioners seek to justify their change of position by referring to *Simler v. Conner* (1963) 372 U.S. 221. But that case is entirely consistent with the accepted rule which petitioner acknowledged in the courts below. There, in determining whether an action was "legal" or "equitable" for the purpose of applying the Federal constitutional guaranty of trial by jury, the Court looked to Federal law. That is, one looks to the law of the jurisdiction whose statute or constitution is being interpreted to determine its meaning. Here the statute interpreted was that of California.

Petitioners' present argument is answered in the cases cited above and numerous others involving the various state statutes of limitation which were applicable until passage of the Federal act. For example, in *Gordon v. Loew's Incorporated,* supra, at page 457, the court said:

> "It is suggested that section 4 of the Clayton Act cannot thus be held to be a penal statute because the Supreme Court of the United States held in Chattanooga Foundry & Pipe Works v. Atlanta, 1906, 203 U.S. 390, 27 S. Ct. 65, that the five years limitation upon suits 'for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise' imposed by the predecessor of section 2462 of title 28, United States Code, was not applicable to such a suit. It must, of course, be conceded that such a suit is not for a penalty within the meaning of the federal statute of limitations now incorporated in section 2462. But it does not follow that the law which authorizes such a suit to be brought may not be a penal statute within the meaning of section 2A:14-10 of the New Jersey Revised Statutes. For 'penal' and 'penalty' are not words of art. On the contrary, as is the case with many other terms used in the law, their meaning varies with the circumstances in which they are used and takes on the meaning in each instance which the user intends. See Huntington v. Attrill, 1892, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123. As an illustration we may point out that actions under the antitrust laws at other times and in other settings have been described by the federal courts as authorizing the recovery of a penalty. And indeed the fact that the antitrust laws had been held to be penal in respect to the application of the statutes of limitations of some states but not of others was one of the reasons why Congress in 1955 enacted the uniform statute of limitations applicable to these cases."

The question is not whether a Clayton Act suit is penal within the meaning of Federal law. "Penalty" was used in a

Federal statute of limitations in its "strict and primary sense" as referring *only* to suits by the Government and therefore *that* statute did not apply to Clayton Act suits.[3] But section 340(1) of the California Code of Civil Procedure obviously used the word in another sense for it speaks of an action "for a penalty * * * given to an individual." The question is what the Legislature of California meant by these words when it chose to use them as a mode of description. And the answer disclosed by an examination of the California cases interpreting and applying section 340(1) of the Code of Civil Procedure is that in these words California included actions for multiple damages (see the discussion of the California cases in the opinion of the Court of Appeals, App. to Pet., pp. 16-18).

2. Near the outset of its opinion the Court of Appeals stated that in an "attempt to prognosticate * * * the result at which a state court would arrive, we find many gray areas." And in determining this question, the court concluded that it would follow the decision of the District Court unless it was deemed "clearly erroneous."

Petitioners argue (Pet., pp. 11-12) that the law of a state is a question of law and that the Court of Appeals erred in applying the "clearly erroneous" test.

Petitioners simply misinterpret the opinion of the court below. The Court of Appeals recognized that the District Judge brought to his decision his many years of experience as a member of the California Bar. As Mr. Justice Holmes pointed out in the *Chattanooga Foundry* case, supra, page 398, "as this question involves the construction of local law we cannot but attribute weight to the opinion of the judge who rendered the judgment, in view of his experience upon

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3. This was specifically pointed out in *Chattanooga Foundry v. Atlanta* (1906) 203 U.S. 390, 397, citing *Huntington v. Attrill* (1892) 146 U.S. 657, 688.

the Supreme Court of Tennessee." Notwithstanding the weight which the Court of Appeals properly accorded the decision of the District Court, it independently and carefully reviewed the California decisions (App. to Pet., p. 19):

> "We have examined the cases cited in the trial court's memorandum, and we believe they, and his reasoning based thereon, carry conviction."

3. Petitioners next refer to a statement by a California superior court judge in an unreported ruling on demurrer in the case of *Ehrhorn v. Caminol Company.* They contend (Pet. pp. 13-15) that the failure of the Court of Appeals to accept this statement as the law of California is in conflict with a footnote in *U. S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 753, in which this Court said that a "decree" by a California superior court "seems to fall" within those decrees binding upon Federal courts in diversity cases.

The *Ehrhorn* ruling was not a "decree" of any state court. What petitioners invoke is a mere unreported aside of a superior court of Fresno County, California. There defendants had filed a demurrer to a complaint asserting a claim under the state antitrust act, and the demurrer was sustained for failure to state a cause of action. If one were to go to the clerk's office in Fresno and look at the records, he would find that one of several grounds of the demurrer was the statute of limitations, that the judge sustained the demurrer on grounds other than the statute of limitations, and that, in his order, he said that he was of the opinion that the three-year statute applied. What his reasoning was does not appear, and at that time it was elementary California law that "Any matter inserted in the order other than the decision for or against the demurrer is surplusage and not to be regarded" (*Kritzer v. Lancaster* (1950) 96 Cal. App.

2d 1, 6, 214 P.2d 407). Furthermore, the order in *Ehrhorn* was not a final disposition of the case; indeed, it never was disposed of on its merits, for it was later dismissed for lack of prosecution. As the opinion of the Court of Appeals shows (App. to Pet., pp. 6-7), under California law a ruling, much less a gratuitous expression of view, by a superior court judge at an intermediate stage of a case is binding on no one, and even a final decision of a superior court is binding on no other superior court. A California superior court is not an appellate court but the lowest trial court of general jurisdiction. Each of the 58 counties of California has a superior court, and there are 345 superior court judges, each sitting alone. Superior court opinions are not reported. There is no digest of their decisions. As this Court said in *King v. Order of Travelers* (1948) 333 U.S. 153, 161:

> "• • • it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court."

4. Petitioners' last question differs from the first five in that it assumes application of the California one-year statute but turns to the question whether the statute was tolled under section 5 of the Clayton Act (15 U.S.C. 16) by the pendency of *United States v. Standard Oil Company, et al.*, Civil No. 11584-C (S.D. Cal.). But what petitioners state on the subject has nothing whatever to do with the present case. Petitioners' presentation merely criticizes a decision of the Ninth Circuit rendered in 1956 (*Steiner v. 20th Century-Fox Film Corporation*, 232 F.2d 190). Certiorari to review the instant case is not an appropriate way to review *Steiner*. The decision of the Court of Appeals here did not require support of the principle of the *Steiner* case that petitioners assail and is not based on it.

Section 5 of the Clayton Act provides that whenever a proceeding by the United States under the antitrust laws is pending, the running of the statute of limitations is suspended respecting every private right of action "based in whole or in part on any matter complained of in said proceeding." The petition here fails to indicate wherein petitioners' action is based in any part on any matter complained of in *United States v. Standard.* Petitioners admit that no overt act of which they complain was involved in the Government's suit (Pet., p. 19), for the gist of their attack on *Steiner* is that no identity of overt acts is necessary. But the petitioners fail to point out any identity whatever *even between the conspiracies charged in the two cases.* In fact they were wholly different (R. 2, 12, 1136). As the Court of Appeals held (App. to Pet., p. 31):

> "Thus, there were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties."

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

Dated: August 28, 1964.

Respectfully submitted,

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